83-315

No.

Office-Supreme Court, U.S.
FILED
AUG 26 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DeVRY INC.

Petitioner,

v.

JOE ANN McCLANDON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

MARIAN CONROY HANEY
115 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

Of Counsel:

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2200

Pandick Press Midwest, Inc., Chicago • 454-7600

QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees to a claimant a right to a hearing where an opposing party would thereby be deprived of its constitutional due process rights and where the doctrine of *res judicata* would thereby be ignored.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
The Appellate Court Decision Involves Important Questions of Federal Constitutional Law and Conflicts with Applicable Decisions of This Court	7
CONCLUSION	11
APPENDIX A	
Opinion of the Appellate Court of Illinois, First Judicial District, dated January 10, 1983	1a
APPENDIX B	
Supplemental Opinion of the Appellate Court of Illinois, First Judicial District, dated February 28, 1983	9a
APPENDIX C	
Oral Opinion of the Circuit Court of Cook County, Illinois, dated May 4, 1981	11a
APPENDIX D	
Order of the Circuit Court of Cook County, Illinois, dated May 4, 1981	15a
APPENDIX E	
Order of the Circuit Court of Cook County, Illinois, dated July 23, 1981	17a

APPENDIX F

Petition for Appeal as a Matter of Right or, Alternatively, Petition for Leave To Appeal, filed in the Supreme Court of Illinois 18a

Appendix G

Denial of Bell and Howell's Petition for Leave To Appeal by the Illinois Supreme Court, dated May 31, 1983 ..... 32a

Appendix H

Denial of McClandon's Petition for Leave To Appeal by the Illinois Supreme Court, dated May 31, 1983 ..... 33a

Appendix I

Order of the Circuit Court of Cook County, Illinois, dated July 2, 1980, in *Bell and Howell Schools* v. *Illinois FEPC, et al.* 34a

Appendix J

Order of the State of Illinois Human Rights Commission, dated September 10, 1980, in *In the Matter of: Joe Ann McClandon and Bell and Howell Schools* 35a

Appendix K

Excerpt from Brief of Defendant-Appellee, filed in the Appellate Court of Illinois, First Judicial District 36a

Appendix L

Excerpt from Brief for Plaintiff-Appellant, filed in the Appellate Court of Illinois, First Judicial District 43a

TABLE OF AUTHORITIES

PAGE

Cases

Arnold & Murdock Co. v. *Industrial Commission*, 314 Ill. 251, 145 N.E. 342 (1924) 8
Baldwin v. *Iowa State Traveling Men's Assn*, 283 U. S. 522 (1931) 6, 10
Bell and Howell Schools v. *State of Illinois FEPC, Earle Tockman and Joe Ann McClandon*, No. 79 CH 1085 (Circuit Ct. of Cook County, 1980) 3
Cox Broadcasting Corp. v. *Cohn*, 420 U. S. 469 (1975) 6
Evans v. *City of Chicago*, 689 F. 2d 1286 (7th Cir. 1982) 8
Federated Department Stores, Inc. v. *Moitie*, 452 U. S. 394 (1981) 6, 10
Hart Steel Co. v. *Railroad Supply Co.*, 244 U. S. 294 (1917) 10
Linkletter v. *Walker*, 381 U. S. 618 (1965) 9
Logan v. *Zimmerman Brush Company*, 455 U. S. 422 (1982) 4, 5, 9
McCullough v. *Virginia*, 172 U. S. 102 (1898) 8
Smolen v. *Industrial Commission*, 324 Ill. 32, 154 N.E. 441 (1926) 8
The Board of Regents of State Colleges v. *Roth*, 408 U. S. 564 (1972) 8

Constitutional Provisions and Statutes

U. S. Const. amend. XIV, §1 ..... 2, 4, 5, 6, 7, 8
28 U.S.C. §1257(3) 2
42 U.S.C. §1981 3
Ill. Const. Art. 1, §2 7
Ill. Const. Art. 1, §17 3
Ill. Rev. Stat. ch. 48, §858.01(a) 3
Ill. Rev. Stat. ch. 48, §858.01a 3, 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BELL AND HOWELL SCHOOLS,

Petitioner,

v.

JOE ANN McCLANDON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

Bell and Howell Schools (now DEVRY INC.) ("Bell and Howell")[1] prays that a writ of certiorari issue to review the judgments of the Appellate Court of Illinois, First Judicial District, entered on January 10, 1983, and February 28, 1983, insofar as they reversed the Circuit Court of Cook County's decision on Counts I and II of Joe Ann McClandon's ("McClandon's") Complaint.

---

[1] DeVRY INC. (formerly Bell and Howell Education Group which was formerly Bell and Howell Schools) is a wholly owned subsidiary of Bell & Howell Co. DeVRY INC. has no subsidiaries or affiliates.

OPINIONS BELOW

The opinions of the Appellate Court of Illinois (App. A, B, pp. 1a-10a) are reported at 112 Ill.App.3d 367 (1st Dist. 1983). The orders and opinion of the Circuit Court of Cook County (App. C, D, E, pp. 11a-17a) are not reported.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on January 10, 1983 (App. A, pp. 1a-8a). Bell and Howell filed a Petition for Rehearing which was denied on February 28, 1983 (App. B, pp. 9a-10a). A supplemental opinion was delivered on February 28, 1983, upon the denial of the Petition for Rehearing (App. B, pp. 9a-10a). The Illinois Supreme Court denied Bell and Howell's Petition for Appeal as a Matter of Right or, Alternatively, Petition for Leave To Appeal on May 31, 1983 (App. G, p. 32a). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In October, 1975, McClandon filed two charges with the Illinois Fair Employment Practices Commission ("Commission") against Bell and Howell, which were not settled or

adjusted by conference or conciliation (App. F, p. 20a). The Commission did not issue a Complaint within 180 days after the filing of the charges (App. F, p. 20a).

On February 21, 1979, Bell and Howell filed a Complaint in the Circuit Court of Cook County against the Commission, an Administrative Law Judge, and McClandon, seeking a declaratory judgment and injunction enjoining McClandon and the others from proceeding with the processing of McClandon's charges before the Commission. *Bell and Howell Schools* v. *State of Illinois FEPC, Earle Tockman and Joe Ann McClandon,* No. 79 CH 1085 (App. F, p. 21a). Bell and Howell claimed that the Commission did not have jurisdiction of McClandon's charges because a Complaint had not been filed within 180 days of the filing of McClandon's charges as statutorily mandated. Ill. Rev. Stat. ch. 48, §858.01(a)(App. F, p. 21a). On July 2, 1980, the Circuit Court ruled that the Commission did not have jurisdiction to proceed on McClandon's charges and dismissed the case with prejudice (App. I, p. 34a). The Commission subsequently dismissed McClandon's charges (App. J, p. 35a). McClandon never appealed from the July 2, 1980 decision or the Commission's dismissal of her charges (App. F, p. 21a).

On November 25, 1980, McClandon filed a four-count Complaint alleging employment discrimination by Bell and Howell. Counts I and II were brought pursuant to Ill. Rev. Stat. ch. 48, §858.01a ("Section 858.01a");[2] Count III was brought under 42 U.S.C. §1981; and Count IV was brought under Article 1, Section 17, of the Illinois Constitution (App. A, p. 1a).

---

[2] Section 858.01a permitted a person who filed a charge with the Commission prior to March 30, 1978, which charge was not settled, adjusted or, within 180 days of its filing, the subject of a Commission Complaint or an order that no Complaint be issued, to seek relief in Circuit Court.

On May 4, 1981, pursuant to Bell and Howell's Motion To Dismiss, which was based, *inter alia*, on the argument that Section 858.01a was unconstitutional under both the Federal and State Constitutions, the Circuit Court dismissed McClandon's Complaint with prejudice for the following reasons: Counts I and II were dismissed because Section 858.01a, the jurisdictional predicate of those Counts, is unconstitutional as violative of Bell and Howell's due process and equal protection rights and creates liabilities for past events; Count III was dismissed because it is untimely and does not state a cause of action; and Count IV was dismissed because it is time barred (App. D, pp. 15a-16a).

On July 23, 1981, the Circuit Court denied Plaintiff's Motion for Rehearing, Reconsideration or to Vacate Judgment or, in the Alternative, Motion To Modify Order of May 4, 1981 (App. E, p. 17a).

On February 24, 1982, in *Logan* v. *Zimmerman Brush Company*, 455 U. S. 422 (1982), this Court, in reversing the Illinois Supreme Court's decision that had rejected the claimant's due process argument, determined that a claimant's access to the Commission's adjudicatory procedures was a property interest protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Upon appeal of the Circuit Court's May 4, 1981, and July 23, 1981 decisions, in her opening brief filed March 26, 1982, McClandon changed the focus of her contentions and argued in the Illinois Appellate Court that pursuant to *Logan*, under the Due Process Clause of the Fourteenth Amendment, she is entitled to a hearing on the merits of her claims. For example, McClandon stated:

> *Logan* requires that each complainant, whose timely filed charge was dismissed because of the failure of the Commission to convene a fact finding conference within 120 days of the proper filing of the charge, be accorded a

> hearing. The same requirement applies to each complainant whose timely filed charge was dismissed because of the failure of the Commission to issue a complaint within the statutorily prescribed time period. These claimants too must be accorded a hearing. To hold otherwise would be to deny these persons the due process of law guaranteed under the Fourteenth Amendment of the United States Constitution.

(App. L, p. 44a).

Bell and Howell countered that reliance on *Logan* and its rationale was misplaced because in this case Bell and Howell had a due process vested right in the final unappealed-from July 2, 1980 judgment which determined that the Commission did not have jurisdiction to process McClandon's charges (App. K, p. 40a). Further, Bell and Howell argued that the July 2, 1980 judgment was *res judicata* of the issue of whether the Commission has jurisdiction of McClandon's charges and barred a contrary determination (App. K, p. 40a). Bell and Howell also argued that *Logan* should not be applied retroactively (App. K, pp. 41a-42a).

On January 10, 1983, the Appellate Court reversed the Circuit Court's May 4, 1981 dismissal of Counts I and II of McClandon's Complaint, and affirmed the Circuit Court's dismissal of Counts III and IV of McClandon's Complaint and July 23, 1981 denial of McClandon's Motion (App. A, pp. 1a-8a).

In reversing the Circuit Court's dismissal of Counts I and II of McClandon's Complaint, the Appellate Court agreed with the Circuit Court that Section 858.01a, the jurisdictional predicate of those Counts which would have entitled McClandon to a Court hearing, is unconstitutional (App. A, pp. 1a, 3a). The Appellate Court, however, determined that it must be guided by *Logan* and decided that under the Fourteenth Amendment McClandon is entitled to a Commission hearing (App. A, pp. 3a-5a). Accordingly, the Appellate Court remanded this case to the Circuit Court with directions to add the Department of

Human Rights and Human Rights Commission (the successors to the Commission) as necessary parties and to order the Department to accept and process McClandon's charges (App. A, p. 5a).

On February 28, 1983, the Appellate Court denied Bell and Howell's Petition for Rehearing of the portion of the Appellate Court's January 10, 1983 ruling which reversed the decision of the Circuit Court dismissing Counts I and II of McClandon's Complaint (App. B, pp. 9a-10a).[3]

On March 30, 1983, Bell and Howell filed with the Illinois Supreme Court a Petition for Appeal as a Matter of Right or, Alternatively, Petition for Leave To Appeal (App. F, pp. 18a-31a). In it, Bell and Howell argued, *inter alia,* that the Appellate Court decision operates to deprive Bell and Howell

---

[3] The decision of the Appellate Court is final despite the ordering of further proceedings. There is finality where, as here, "the federal issue [whether McClandon is entitled to a Commission hearing under the Fourteenth Amendment where to give her one would deprive Bell and Howell of its due process vested rights and would violate the doctrine of *res judicata*] has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 482-83 (1975). Clearly, a refusal to review the federal issue now might seriously erode federal policy, *i.e.,* the guarantee to Bell and Howell of its constitutional rights and the policy behind *res judicata,* " 'that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.' " *Federated Department Stores, Inc.* v. *Moitie,* 452 U.S. 394, 401 (1981), citing *Baldwin* v. *Iowa State Traveling Men's Assn,* 283 U.S. 522, 525 (1931).

of its due process rights under the Fourteenth Amendment of the United States Constitution and under the Illinois Constitution because it deprived Bell and Howell of its vested right in the July 2, 1980 judgment that the Commission does not have jurisdiction of McClandon's charges and in the Commission's dismissal of McClandon's charges (App. F, pp. 23a-27a). Bell and Howell also argued that the Appellate Court's decision was contrary to the doctrine of *res judicata* in that it ignored the July 2, 1980 prior contrary ruling (App. F, pp. 27a-30a). Bell and Howell further argued that *Logan* should not be applied retroactively (App. F, p. 25a).

On May 31, 1983, the Illinois Supreme Court denied both Bell and Howell's petition for leave to appeal (App. G, p. 32a) and one filed by McClandon (App. H, p. 33a).

REASONS FOR GRANTING THE WRIT

The Appellate Court Decision Involves Important Questions of Federal Constitutional Law and Conflicts with Applicable Decisions of This Court.

The Appellate Court held that McClandon is entitled to a Commission hearing under the Due Process Clause of the United States Constitution even though Bell and Howell would thereby be deprived of its constitutional due process rights and the doctrine of *res judicata* would be ignored.

The Appellate Court decided that McClandon has a right under the Fourteenth Amendment to have the Commission process her charges even though Bell and Howell had previously obtained a final unappealed-from judgment in Circuit Court that McClandon does not have such a right and even though the Commission had dismissed McClandon's charges for lack of jurisdiction. The Appellate Court's decision is an erroneous departure from well-established constitutional precedent, deprives Bell and Howell of its constitutional vested rights, and is in violation of the strong federal policy underlying the doctrine of *res judicata*.

It is unequivocally clear and fundamental that Bell and Howell has a vested right in the July 2, 1980 judgment that the Commission does not have jurisdiction of McClandon's charges and in the Commission's dismissal of Plaintiff's charges. *E.g., McCullough* v. *Virginia,* 172 U.S. 102 (1898). Indeed, the Seventh Circuit Court of Appeals in *Evans* v. *City of Chicago,* 689 F. 2d 1286, 1296 (7th Cir. 1982), stated:

> Under Illinois law, a judgment becomes a vested right of property once it is no longer subject to review or modification. *Arnold & Murdock Co.* v. *Industrial Commission,* 314 Ill. 251, 255; 145 N.E. 342 (1924). *See Smolen* v. *Industrial Commissioner,* 324 Ill. 32, 34-35, 154 N.E. 441 (1926).

Under the Fourteenth Amendment, no state can deprive any person of life, liberty or property without due process of law. The United States Supreme Court stated in *The Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564, 577 (1972), that property interests are derived not from the Constitution but from independent sources, such as state law:

> Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Under this due process analysis also, because Bell and Howell has a vested property right in the July 2, 1980 court judgment and the Commission's dismissal of McClandon's charges under Illinois law, the Fourteenth Amendment also protects Bell and Howell from the deprivation of that right.

McClandon never appealed from the Circuit Court's July 2, 1980 ruling that the Commission does not have jurisdiction of McClandon's charges or from the Commission's dismissal of her charges. The Appellate Court's decision that this case

should be remanded to the Commission for processing of McClandon's charges in spite of McClandon's failure in this regard operates to deprive Bell and Howell of its constitutional rights.

In *Logan* v. *Zimmerman Brush Company, supra,* relied on by the Appellate Court, the issue of whether Logan's constitutional rights would be violated if he was deprived of a Commission hearing because of the Commission's failure to hold a fact-finding conference within the statutorily mandated time period was on *direct appeal.* Here, McClandon *never appealed* the July 2, 1980 Circuit Court judgment that the Commission does not have jurisdiction of her charges or the dismissal of her charges before the Commission. Accordingly, Bell and Howell, unlike Zimmerman Brush Company in *Logan,* obtained a vested right in the court judgment that the Commission does not have jurisdiction of McClandon's charges and in the Commission's dismissal of McClandon's charges.

It is manifestly clear that to apply in this case *Logan*'s holding that an individual is entitled to a Commission hearing deprives Bell and Howell of its constitutional vested rights in the July 2, 1980 Circuit Court final judgment and the final dismissal of McClandon's charges before the Commission.[4] Where, as here, to allow McClandon a hearing deprives Bell and Howell of its constitutional rights, there exists a very substantial federal question for this Court to decide.

---

[4] Moreover, it is well established that retroactive application of constitutional decisions, such as *Logan,* should be denied where, for example, as here, a party would thereby be deprived of its vested due process rights and where there has been a prior final determination of the issue involved. *E.g., Linkletter* v. *Walker,* 381 U.S. 618, 627 (1965).

Further, the Circuit Court's July 2, 1980 ruling that the Commission does not have jurisdiction of McClandon's charges in a case involving the same parties as are in this case is clearly *res judicata* and precludes a later contrary court ruling. *E.g., Federated Department Stores, Inc.* v. *Moitie, supra,* 452 U.S. at 398. In its decision that the Commission *does* have jurisdiction of McClandon's charges the Appellate Court ignored the *res judicata* effect of the contrary unappealed-from July 2, 1980 ruling.

The Appellate Court's determination is contrary to, and is a radical departure from, well-established judicial authority which has unanimously recognized the doctrine of *res judicata* and its fundamental and necessary place in jurisprudence. For example, as this Court stated in *Federated Department Stores, Inc.* v. *Moitie, supra,* 452 U. S. at 401:

> This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." Baldwin v. Traveling Men's Assn., 283 US 522, 525, 75 L Ed 1244, 51 S Ct 517 (1931). We have stressed that "[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . ." Hart Steel Co. v. Railroad Supply Co. 244 Co. 244 US 294, 299, 61 L Ed 1148, 37 S Ct 506 (1917).

Clearly, the Illinois Appellate Court's decision, in ignoring Bell and Howell's due process constitutional rights and the principle of *res judicata,* is in conflict with fundamental principles repeatedly espoused by this Court. The issues sought to be brought before this Court are of substantial importance necessitating final resolution in this judicial forum.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARIAN CONROY HANEY
115 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

Of Counsel:

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2200

August, 1983

APPENDIX

APPENDIX A

81-2100

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

FIRST DIVISION

January 10, 1983

Joe Ann McClandon, *Plaintiff-Appellant,* *vs.* Bell and Howell Schools, *Defendant-Appellee.*	Appeal from the Circuit Court of Cook County. Honorable **RICHARD L. CURRY,** Judge Presiding.

JUSTICE O'CONNOR delivered the opinion of the court:

Plaintiff, Joe Ann McClandon, filed suit on November 25, 1980, in the circuit court of Cook County charging defendant, Bell and Howell Schools, with employment discrimination in violation of the Illinois Human Rights Act (IHRA) (Ill. Rev. Stat. 1980 Supp., ch. 68, pars. 1-101 *et seq.*), of Article I, section 17 of the 1970 Illinois Constitution and of section 1981 of the Civil Rights Act of 1866 (42 U.S.C. §1981).

Counts I and II allege employment discrimination with respect to plaintiff's salary and job classification and retaliation for the filing of a discrimination charge. The jurisdiction for these counts is based on section 8.01a of the Fair Employment Practices Act (FEPA) (Ill. Rev. Stat. 1979, ch. 48, par. 858.01a; repealed and replaced by section 9-102(B)(1) of the IHRA, Ill. Rev. Stat. 1980 Supp., ch. 68, par. 9-102(B)(1)). Count III is based on 42 U.S.C. §1981 and alleges race discrimination by the defendant in its treatment of plaintiff's salary and job classifications. Count IV alleges race and sex discrimination under Article I, section 17 of the Illinois Constitution.

On May 4, 1981, the trial court dismissed plaintiff's complaint with prejudice. Upon defendant's motion, the trial court found: the jurisdictional predicate for counts I and II, section 8.01a of the FEPA, was unconstitutional; count III did not state a cause of action and was time barred; and count IV was time barred. On July 23, 1981, the court, on plaintiff's motion, refused to reconsider its judgment and denied plaintiff the opportunity to file an amended complaint. Plaintiff's motion in this respect included a proposed amended complaint.

Plaintiff appeals, contending (1) section 8.01a of the FEPA is constitutional; (2) her claim brought pursuant to 42 U.S.C. §1981 states a cause of action and is not time barred; (3) the claim of race and sex discrimination in employment practices under the Illinois Constitution is not time barred; and (4) the trial court abused its discretion in refusing to allow plaintiff leave to amend her complaint.

Plaintiff started working for defendant in October 1974 as a data entry supervisor. On December 1, 1974, she was assigned additional responsibilities without any additional compensation. In October 1975 plaintiff's position was upgraded without a salary increase. During the four-month period beginning in October 1974 and ending April 1975 plaintiff was not compensated for overtime work. After filing the initial charge of employment discrimination in October 1975, some of plaintiff's authority and job responsibilities were removed by defendant. Plaintiff remained on the job until August 1976.

Conciliation attempts between plaintiff and defendant apparently failed. The FEPC then issued an administrative complaint against defendant on November 22, 1977. On December 4, 1978, the FEPC informed plaintiff of her right to pursue the claims on her own in the circuit courts. This notice was in response to the addition of section 8.01a to the FEPA which provided a remedy for certain individuals whose discrimination charges were not acted upon by the FEPC within the 180-day time limit. Ill. Rev. Stat. 1979, ch. 48, par. 858.01a.

After an administrative law judge refused to dismiss the FEPC complaint, defendant instituted an action for declaratory relief on February 21, 1979. In that matter, ***Bell and Howell Schools v. Earle Tockman and Joe Ann McClandon,*** No. 79 CH 1085, the circuit court dismissed the action upon FEPC's motion to dispose of the case. The court's order, dated July 2, 1980, also stated that the FEPC was without jurisdiction to proceed on plaintiff's charges then before it.

On September 10, 1980, the Illinois Human Rights Commission (Commission) (successor to the FEPC) dismissed for lack of jurisdiction the administrative complaint relative to plaintiff's charges. As mentioned above, plaintiff then filed her present action.

Since the trial court's dismissal of this cause and the pendency of this appeal three cases have been decided which control our review of the issues before us. In *Wilson v. All-Steel, Inc.* (1981), 87 Ill. 2d 28, 428 N.E.2d 489, the Illinois Supreme Court determined that section 9-102(B) of the IHRA is unconstitutional special legislation. Insofar as section 9-102(B) is the successor statute to section 8.01a, we are constrained to find that the trial court's ruling that section 8.01a is unconstitutional is correct. Thus, plaintiff's rights cannot be predicated upon it.

However, in a case with many factual similarities the United States Supreme Court found that an individual's access to the FEPA's adjudicatory procedures was a property interest protected by the due process clause of the fourteenth amendment. (*Logan v. Zimmerman Brush Co.* (1982), ____ U.S. ____, 50 U.S.L.W. 4247, 4250, February 24, 1982.) In *Logan,* the petitioner sought resolution of employment discrimination charges with the FEPC. The FEPC failed to convene a fact-finding conference within the prescribed 120 days of the filing of the charges. The Illinois Supreme Court determined that the FEPC lacked jurisdiction because the 120-day period was

mandatory. (See, *Zimmerman Brush Co. v. The Fair Employment Practices Commission* (1980), 82 Ill. 2d 99, 411 N.E.2d 277.) In reversing this determination, the United States Supreme Court found that Logan was deprived of a property right without due process when an administrative delay (for which he was not responsible) led to the dismissal of his complaint.

In *Lott v. Governers State University* (1982), 106 Ill. App. 3d 851, 436 N.E.2d 569, the original issue on appeal was whether a suit against the State under section 9-102(B) of the IHRA could seek monetary damages. The court stated that this issue became moot after the supreme court's decision in *Wilson* invalidating that section. (106 Ill. App. 3d 851, 852.) This court was then confronted with the dilemma of reconciling *Wilson* and *Logan*. First we found that plaintiff had a protected property interest in his employment discrimination claim and that he could not constitutionally be deprived of that interest by the inaction of the FEPC. (106 Ill. App. 3d 851, 854.) In determining what process was due plaintiff, we said (106 Ill. App. 3d 851, 855):

> "* * * In *Logan v. Zimmerman Brush Co.*, the court found that 'Logan is entitled to have the Commission [FEPC] consider the merits of his charge, based on the substantiality of the available evidence, before deciding whether to terminate his claim.' (___ U.S. ___, 71 L.Ed.2d 265, 277, 102 S. Ct. ___, ___.) The same minimum process is due the plaintiff here. Lott is entitled to have the Department of Human Rights and the Human Rights Commission (the successors to the FEPC) consider the merits of his discrimination charge in accordance with the procedures set out in articles 7 and 8 of the IHRA. The IHRA provides that the Department of Human Rights must accept and investigate charges of civil rights violations. The Department may, upon determining that there is no substantial evidence of a violation, dismiss the complaint. When a complaint is supported by sufficient evidence and there has been no settlement or adjustment through conciliation, the Department must file a written complaint with the Human Rights Commission, which is

empowered to adjudicate the dispute and enforce its findings. See Ill. Rev. Stat. 1980 Supp., ch. 68, pars. 7-102, 8-102.

"It follows that the Department of Human Rights and the Human Rights Commission are necessary parties in this action. Upon remand to the trial court, plaintiff should be permitted to amend his complaint and add these entities as parties defendant. (See Ill. Rev. Stat. 1979, ch. 110, par. 26 (new parties may be added, by order of court, at any stage of the cause, as justice may require).) The trial court should then order the Department to accept and process plaintiff's charge as set out in the IHRA. [Footnote omitted.] We foresee no limitations problem here, as plaintiff's original charge was timely brought before the FEPC."

We agree with this determination and find plaintiff here to be in a similar position. Accordingly, counts I and II are remanded so that plaintiff may amend those counts and add the appropriate entities as parties defendant.

Defendant argues that plaintiff may not now argue the constitutionality of section 8.01a because of the disposition of the earlier declaratory action. In light of *Wilson*, this is now not at issue. Defendant further argues that *Lott* is not applicable because it did not consider the defendant's due process rights. It is specifically argued that the dismissal of the administrative complaint was not defendant's fault and to subject defendant to further proceedings would potentially subject it to increased back-pay liability. We recognize that an employer has a right to an expeditious determination of his liability (87 Ill. 2d 28, 36); plaintiff, however, "is entitled to have the Commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate [her] claim." (*Logan*, 50 U.S.L.W. 4247, 4251.) Since plaintiff left defendant's employ in August 1976, it is doubtful that further proceedings will result in increased liability other than that normally encountered by litigants engaged in our appellate process.

To the extent this decision may be considered retroactive in application, we find the result reached in this case will not be an undue hardship on the parties involved. Considering the particular relations and conduct of the parties to this case and the rights asserted by them, we feel this decision to be appropriate in light of public policy and the statutory scheme involved. See, *Linkletter v. Walker* (1965), 381 U.S. 618.

Count III, based on 42 U.S.C. §1981, claims that plaintiff was not compensated for overtime work, that she was assigned additional job responsibilities without an increase in rate of pay and that when her position was finally upgraded she was not given a salary increase as were other non-black employees. Count IV makes similar allegations based upon Article 1, section 17, of the Illinois Constitution. The trial court found these counts were time-barred largely in response to defendant's argument that there are no allegations of continuing violations of plaintiff's right to be free from employment discrimination. See, *United Air Lines v. Evans* (1977), 431 U.S. 553; *Patterson v. General Motors Corp.* (7th Cir. 1980), 631 F.2d 476, *cert. denied* 451 U.S. 914.

On appeal, plaintiff argues that her complaint does indeed make allegations of continuing violations of her rights. She argues that the discriminatory pay scheme and defendant's acts of retaliation continued until August 1976 when she left the company after the division with which she worked went out of existence. It is clear to us, after examination of the complaint, that it is deficient for the lack of allegations of continuing violations.

This determination, however, is not entirely dispositive of this issue. Plaintiff requested leave to file an amended complaint which would allegedly cure the defects by sufficiently alleging continuing violations on the part of defendant so as not to be barred by the five-year limitations period for bringing a section 1981 action (see, *Waters v. Wisconsin Steel Works of*

International Harvester Co. (7th Cir. 1970), 427 F.2d 476, *cert. denied* 400 U.S. 911) or for bringing an action under the Illinois constitutional provision. As noted above, plaintiff included her proposed amended complaint with her motion to reconsider or, alternatively, for leave to file an amended complaint. Courts exercise broad discretion when deciding to grant or deny leave to amend pleadings. *Wheat v. Freeman Coal Mining Corp.* (1974), 23 Ill. App. 3d 14, 319 N.E.2d 290.

Because the complaint was filed November 25, 1980, plaintiff must allege continuing violations occurred after November 25, 1975. The allegations made in counts III and IV of the proposed amended complaint show: from December 1, 1974, to October 4, 1975, plaintiff was given additional job responsibilities without additional compensation; on October 4, 1975, plaintiff's job was upgraded, but she did not receive an increase in salary; defendant gave salary increases to non-black employees upon their assignment to additional responsibilities; plaintiff was deprived of the same right to employment opportunities enjoyed by non-black employees as the result of defendant's intentional policy of discrimination; plaintiff was not compensated for overtime work done during the period of October 25, 1974, to April 1975; and defendant retaliated against plaintiff for filing charges with the FEPC by taking away some of her authority and job responsibilities.

Plaintiff's claims for additional compensation prior to October 4, 1975, and for overtime compensation up to April 1975 must fail for not being made in a timely fashion. So too must the claims for not receiving a salary increase. Plaintiff's claim of a discriminatory salary policy is tied into her assertion that she was employed at a lower grade classification than other non-black employees with less experience. As an example, she cites the promotion of a non-black supervisor to a higher grade classification and rate of pay than she was given. These allegations essentially complain of discrimination on the part of defendant by not promoting plaintiff to a better paying grade

classification. The failure to promote or "upgrade" her position which plaintiff alleges is, absent special circumstances, a "single act by an employer * * * [which] begins the running of the statute of limitations and the natural effects of the alleged discriminatory act are not regarded as 'continuing.' " (*London v. Coopers & Lybrand* (9th Cir. 1981), 644 F.2d 811; see *Patterson v. General Motors Corp.*) Plaintiff makes no specific allegation of the time frame in which she was not promoted and for this reason her pleading is insufficient to avoid the time limitation imposed on this case.

For these reasons we find the trial court did not abuse its discretion in denying plaintiff an opportunity to amend her complaint.

The order of the circuit court of Cook County dismissing counts I and II is reversed and the cause is remanded for further proceedings consistent with this opinion; as to counts III and IV, the order of dismissal is affirmed.

Reversed and remanded in part; affirmed in part.

CAMPBELL, J., and GOLDBERG, J., concur.

APPENDIX B

81-2100

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

FIRST DIVISION

February 28, 1983

Joe Ann McClandon, *Plaintiff-Appellant,* *vs.* Bell and Howell Schools, *Defendant-Appellee.*	Appeal from the Circuit Court of Cook County. Honorable **RICHARD L. CURRY,** Judge Presiding.

JUSTICE O'CONNOR delivered the following supplemental opinion of the court upon denial of defendant's petition for rehearing:

Defendant argues, in a petition for rehearing, that the result of this court's decision allowing plaintiff to add the Department of Human Rights and the Human Rights Commission as parties defendant is precluded by the *res judicata* effect of the unappealed ruling of the circuit court in *Bell and Howell Schools v. State of Illinois Fair Employment Practices Commission* et al, No. 79 CH 1085 [cited in our opinion as *Bell and Howell Schools v. Earle Tockman and Joe Ann McClandon*]. In that declaratory action, defendant was the plaintiff seeking a ruling that the FEPC lacked jurisdiction over the administrative complaint because it was not filed within 180 days of the filing of McClandon's discrimination charges. See Ill. Rev. Stat. 1979, ch. 48, par. 858.01(a).

As mentioned in the body of our opinion, that action was dismissed upon the FEPC's motion to dispose of the case. There was also a finding that the FEPC was without jurisdiction to proceed on McClandon's charges. The administrative complaint embodying McClandon's charges was then dismissed by the administrative law judge, also a party to the declaratory

action. Pursuant to notice from the FEPC (see Ill. Rev. Stat. 1979, ch. 48, par. 858.01(a)), McClandon filed the complaint in the circuit court which is now before us on appeal.

On this appeal, McClandon contended that section 8.01a of the FEPA is constitutional. In support of this contention, she looks to the rationale of the Supreme Court decision in *Logan v. Zimmerman Brush Co.* (1982), ____ U.S. ____, 50 U.S.L.W. 4247, February 24, 1982. Defendant construes McClandon's argument to be directed at the constitutionality of section 8.01(a). This is a "straw-man" argument.

McClandon's arguments are directed at section 8.01a. Defendant's declaratory action was related to the jurisdiction of the FEPC to proceed on an administrative complaint filed after the 180-day period required by section 8.01(a). Ill. Rev. Stat. 1979, ch. 48, par. 858.01(a).

Therefore, the effect of the declaratory action, if any (the action was dismissed rather than granted), was to defeat plaintiff's claim before the FEPC. Thus, plaintiff was in the same position as Lott after his charges were not acted upon within 180 days pursuant to section 8.01(a). (106 Ill. App. 3d 851, 854.) The reasoning and holding of *Lott* therefore applies. 106 Ill. App. 3d 851, 855.

The petition for rehearing is denied.

GOLDBERG and CAMPBELL, JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

JOE ANN McCLANDON,
Plaintiff,

v.

BELL AND HOWELL SCHOOLS,
Defendant.

No. 80 CH 8404

ORAL OPINION
May 4, 1981

THE COURT: Thank you very much. As I indicated when we commenced, I did have an opportunity to review your lengthy and learned briefs and I have had an opportunity to review once again some of the case law that has provided the background and history for the ongoing difficulties of this department in answering its legislative mandate.

The statute provides that comprehensive scheme whereby a citizen can file a charge and have it considered and perhaps reconciled and if not reconciled, litigate his charges and allegations of discrimination in the employment field.

The statute from the very beginning carried a 180 day time limit within which the Commission had to perform its function.

The Supreme Court was asked to address the question as to whether or not the 180 days was a discretionary target to be aimed at by the agency or whether indeed the 180 days was a mandatory limit on the agency in moving these cases to a resolution.

In the *Springfield-Sangamon County* case the court announced the mandatory effect of the 180 days and the court there was expansive in noting the impact of these kinds of

charges against an employer and decided that finality was required within 180 days so that the employer could remedy it, so that the employer could know whether he was going to receive back from the agency an employee he had dismissed or discharged or had passed over for promotion, so that uncertainty in the business world would be minimized to the greatest extent possible and so that the agency would have the appropriate amount of time legislatively set to do its task.

When the 180 days expired here, the defendant in this case was clear of any prospect of having to defend charges by this plaintiff.

At that stage of the law, the department was in the embarrassing position of being the sole or exclusive avenue for relief for those alleging discrimination and having fumbled the ball by not taking action within the mandatory 180 days on hundreds or thousands of these charges.

Rather than adequately funding the agency so the agency could fulfill its mandate initially and then even at the stage of the 858.01(a) amendment, rather than adequately funding the agency so it could fulfill its mandate, the General Assembly sought to take the department off the hook by attempting to create a private cause of action for those whose cases had be [sic] botched.

In doing so the General Assembly ignored the court language, the Supreme Court language that found that the 180 days was a statute of limitations on these claims and the justification for that declaration that the employer in these cases also had a right and that was that he had a right to have the agency properly and promptly fulfill its responsibility and decide these kinds of questions so that the business world could get on with its business.

858.01(a) is not merely an alternative forum because to my view it's an attempt to breathe life into clearly what are dead claims.

When an act attempts to void a statute of limitations, it cannot reasonably be held to be non-substantive and cannot reasonably be said to be procedural only.

In addition to being unconstitutional for reasons that it effects the time bar that this defendant is entitled to rely on, but it is also unconstitutional for equal protection reasons. Equal protection is not satisfied by the classification set out in the statute.

The statute, 858.01(a), gives a private right to litigate only to a very few of the potential claimants whose cases have not been included within the time limit. As a matter of fact, so selective is 858.01(a) of the class of claimants for private action that it gives rise itself to the General Assembly's continuing preference for exclusivity or for exclusive remedy in the Commission.

It is not to my view reasonable to give this very small, very select and very hybrid group the private action and then to deny a private action to all of those who in the future may receive the same inattention or unprofessional handling by the agency.

It's no argument to say that the agency now has 300 days to do what they couldn't do in 180. As counsel points out, we have already seen cases where they can't or haven't or won't do within 300 days what they had been asked to do in 180 and then those claimants have no rights.

There is no distinction between this plaintiff and those claimants, so for that reason the class is clearly suspect and not a reasonable classification. So 858.01(a) is retroactive as it relates to defendant because it creates a new liability for past events and it is unconstitutional, therefore, for the various reasons I have stated.

As to Count II—strike that. As to Count III and IV, plaintiff's 1981 claim or plaintiff's claim under the constitution, it is my view that the violations asserted in this Complaint are not continuing. None of the plaintiff's claims allege a continuing violation. The very best that can be said is that she suffers the ongoing effect of some past act of discrimination. And in some of the counts I'm not certain she suffers the ongoing effects. The allegations in the Complaint are not sufficient to state a claim for continuing violations.

Count III, the 1981 count, does not allege intentional and purposeful discrimination. The count is based on—it is based not on facts alleged, but rather on information and belief and is therefore also insufficient.

As to Count IV, I believe Count IV is similarly barred by reason of the time lapse here.

So for all these reasons, the defendant's motion to dismiss all four counts is granted.

Thank you, ladies.

MS. HANEY: Thank you, your Honor.

MS. LIEB: Thank you.

MS. HANEY: We'll draft an appropriate order.

(Which were all the proceedings had on this date on the above-entitled matter).

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

JOE ANN McCLANDON,
Plaintiff,

v.

BELL AND HOWELL SCHOOLS,
Defendant.

NO. 80 CH 8404

ORDER

This cause coming on to be heard upon Defendant's Motion To Dismiss the Complaint, the Court being fully advised in the premises;

It is hereby ordered that

Because Section 858.01a, the jurisdictional predicate for Counts I and II of Plaintiff's Complaint, is unconstitutional as violative of Defendant's due process and equal protection rights and creates new liabilities for past events, Counts I and II are dismissed; and

Because the claims in Count III of Plaintiff's Complaint brought pursuant to 42 U.S.C. § 1981 are time barred and do not state a cause of action, Count III is dismissed; and

Because the claims in Count IV of Plaintiff's Complaint, brought pursuant to Article I, Section 17 of the Illinois Constitution, are time barred, Count IV is dismissed.

Therefore, Plaintiff's Complaint is dismissed in its entirety with prejudice.

ENTER:

JUDGE RICHARD L. CURRY
MAY 4, 1981
CIRCUIT COURT

MARIAN C. HANEY
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
Attorney for Defendant
115 South LaSalle Street
Chicago, IL 60603
(312) 781-2200

APPENDIX E

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

JOE ANN McCLANDON,
Plaintiff,

v.

BELL AND HOWELL SCHOOLS,
Defendant.

NO. 80 CH 8404

ORDER

This cause coming on to be heard upon Plaintiff's Motion for Rehearing, Reconsideration, or to Vacate Judgment or, in the Alternative, Motion to Modify Order of May 4, 1981 by Granting Plaintiff Leave to File Amended Complaint, the Court being fully advised in the premises;

IT IS HEREBY ORDERED that:

Plaintiff's Motion is denied in its entirety; defendant's request for fees is denied.

ENTER:

JUDGE RICHARD L. CURRY
JULY 23, 1981
CIRCUIT COURT

ROSLYN C. LIEB
Northwestern University Legal Clinic
Attorney for Plaintiff
339 E. Chicago Ave.—Room 119
Chicago, Illinois 60611
649-8576

APPENDIX F

Filed
Mar. 30, 1983
Juleann Hornyak, Clerk

No. 58158

IN THE

Supreme Court of Illinois

JOE ANN McCLANDON,
Plaintiff-Appellee,

vs.

BELL AND HOWELL SCHOOLS,
Defendant-Appellant.

Petition for Appeal as a Matter of Right or, Alternatively, Petition for Leave To Appeal from the Appellate Court of Illinois, First Judicial District.

No. 81-2100

There Heard on Appeal from the Circuit Court of Cook County, County Department, Chancery Division.

Honorable
Richard L. Curry,
Judge Presiding

PETITION FOR APPEAL AS A MATTER OF RIGHT OR, ALTERNATIVELY, PETITION FOR LEAVE TO APPEAL

VEDDER, PRICE, KAUFMAN
& KAMMHOLZ
MARIAN C. HANEY
BARBARA J. STOB
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2200
Attorneys for Defendant-Appellant

Pandick Press Midwest, Inc., Chicago • (312) 454-7600

IN THE

Supreme Court of Illinois

JOE ANN McCLANDON, Plaintiff-Appellee, v. BELL AND HOWELL SCHOOLS, Defendant-Appellant.	Petition for Appeal as a Matter of Right or, Alternatively, Petition for Leave To Appeal from the Appellate Court of Illinois, First Judicial District. No. 81-2100 There Heard on Appeal from the Circuit Court of Cook County, County Department, Chancery Division. Honorable Richard L. Curry, Judge Presiding.

PETITION FOR APPEAL AS A MATTER OF RIGHT OR, ALTERNATIVELY, PETITION FOR LEAVE TO APPEAL

I. Prayer for Appeal as a Matter of Right or, Alternatively, Prayer for Leave To Appeal

Pursuant to Rule 317 of the Rules of the Supreme Court of Illinois, Defendant, Bell and Howell Schools ("Defendant"), seeks to take an appeal from the the decision of the Appellate Court of Illinois, First Judicial District, as a matter of right. Alternatively, pursuant to Rule 315 of the Rules of the Supreme Court of Illinois, Defendant respectfully requests that leave to appeal from the Appellate Court decision be granted. The decision appealed from affirmed in part and reversed in part the Circuit Court's orders which dismissed with prejudice the Complaint of Plaintiff, Joe Ann McClandon ("Plaintiff"), and which denied Plaintiff's motion for reconsideration or, alternatively, to be allowed to file an amended complaint. Only that part of the Appellate Court's decision which reversed in part the Circuit Court's dismissal order is the subject of Defendant's Petition.

II. The Appellate Court's Decision

The Appellate Court's judgment was entered on January 10, 1983. Defendant filed a Petition for Rehearing which was denied on February 28, 1983. A supplemental opinion was delivered on February 28, 1983, upon the denial of Defendant's Petition for Rehearing.

III. Statement of Points Relied Upon for Reversal of the Judgment of the Appellate Court

This case is appealable as a matter of right or, alternatively, leave to appeal should be granted because the Appellate Court's decision raises certain constitutional questions for the first time in this case and is also contrary to clearly established and unanimous judicial authority. The issues require the Supreme Court to exercise its supervisory authority because:

1. The Appellate Court's decision improperly operates to deprive Defendant of its vested constitutional rights in a previous state court judgment, in a Commission dismissal and in the defense created by the running of a statute of limitations.

2. The Appellate Court's decision erroneously ignored the *res judicata* effect of a previous Circuit Court judgment between the same parties which directly contradicted the Appellate Court's decision.

IV. Statement of Facts Relevant to Appeal

In October, 1975, Plaintiff filed two charges with the Illinois Fair Employment Practices Commission ("Commission") against Defendant, which were not settled or adjusted by conference or conciliation (R. C2).[1] The Commission did not issue a Complaint within 180 days after the filing of the charges (R. C2).

[1] Citations to the record on appeal are cited as "R. C____." Citations to the Appendix to this Petition are cited as "App. ____."

On February 21, 1979, Defendant filed a Complaint in the Circuit Court of Cook County against the Commission, an Administrative Law Judge, and Plaintiff, seeking a declaratory judgment and injunction enjoining Plaintiff and the others from proceeding with the processing of Plaintiff's charges before the Commission. *Bell and Howell Schools v. State of Illinois FEPC, Earle Tockman and Joe Ann McClandon,* No. 79 CH 1085. Defendant claimed that the Commission did not have jurisdiction of Plaintiff's charges because a Complaint had not been filed within 180 days of the filing of Plaintiff's charges as statutorily mandated. Ill.Rev.Stat. ch. 48, §858.01(a) (R. C61). On July 2, 1980, the Circuit Court ruled that the Commission did not have jurisdiction to proceed on Plaintiff's charges, and dismissed the case with prejudice (R. C61). The Commission subsequently dismissed Plaintiff's charges (R. C61). Plaintiff never appealed from the July 2, 1980 decision or the Commission's dismissal of her charges.

On November 25, 1980, Plaintiff filed a four-count Complaint alleging employment discrimination by Defendant. Counts I and II were brought pursuant to Ill.Rev.Stat. ch. 48, §858.01a ("Section 858.01a")[2] (R. C2-C3, C5, C12); Count III was brought under 42 U.S.C. §1981 (R. C7); and Count IV was brought under Article 1, Section 17, of the Illinois Constitution (R. C8).

On February 13, 1981, Defendant filed a Motion To Dismiss Plaintiff's Complaint in its entirety (R. C24). On May 4, 1981, the Circuit Court dismissed Plaintiff's Complaint with prejudice for the following reasons: Counts I and II were dismissed because Section 858.01a, the jurisdictional predicate of those Counts, is unconstitutional as violative of Defendant's

[2] Section 858.01a permitted a person who filed a charge with the Commission prior to March 30, 1978, which charge was not settled, adjusted or, within 180 days of its filing, the subject of a Commission Complaint or an order that no Complaint be issued, to seek relief in Circuit Court.

due process and equal protection rights and creates liabilities for past events; Count III was dismissed because it is untimely and does not state a cause of action; and Count IV was dismissed because it is time barred (R. C138).

On July 23, 1981, the Circuit Court denied Plaintiff's Motion for Rehearing, Reconsideration or To Vacate Judgment or, in the Alternative, Motion To Modify Order of May 4, 1981 by Granting Plaintiff Leave To File Amended Complaint (R. C167).

On January 10, 1983, the Appellate Court reversed the Circuit Court's May 4, 1981 dismissal of Counts I and II of Plaintiff's Complaint, and affirmed the Circuit Court's dismissal of Counts III and IV of Plaintiff's Complaint and July 23, 1981 denial of Plaintiff's Motion (App. 10).

In reversing the Circuit Court's dismissal of Counts I and II of Plaintiff's Complaint, the Appellate Court agreed with the Circuit Court that Section 858.01a, the jurisdictional predicate of those Counts, is unconstitutional. The Appellate Court determined, however, that it must be guided by the United States Supreme Court's decision in *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982) (App. 4).

At issue in *Logan* was Ill.Rev.Stat. ch. 48, §858(b), which provided that the Commission must convene a fact-finding conference within 120 days after the filing of a charge. When the 120-day requirement was not met in *Logan*, the employer moved that Logan's charge be dismissed. That request was rejected. The employer then petitioned this Court for an original writ of prohibition. This Court held that the failure of the Commission to comply with the 120-day requirement deprived the Commission of jurisdiction. Upon this Court's rejection of Logan's argument that his constitutional rights would be violated if the Commission's failure were allowed to extinguish his cause of action, Logan appealed his constitutional claims to the United States Supreme Court, 455 U.S.

at 427-28. Because that Court decided in that case that Logan is entitled to have the Commission consider the merits of his charge in a fact-finding conference, 455 U.S. at 434, the Appellate Court in this case decided that Plaintiff here is entitled to a Commission hearing (App. 5-7). Accordingly, the Appellate Court remanded this case to the Circuit Court with directions to add the Department of Human Rights and the Human Rights Commission (the successors to the Commission) as necessary parties and to order the Department to accept and process Plaintiff's charges (App. 6).

On February 28, 1983, the Appellate Court denied Plaintiff's [sic] Petition for Rehearing of the portion of the Appellate Court's January 10, 1983 ruling which reversed the decision of the Circuit Court dismissing Counts I and II of Plaintiff's Complaint (App. 12).

V. Argument

A. Because the Appellate Court Decision Raises New Constitutional Questions in That It Operates To Deprive Defendant of Its Constitutional Due Process Rights, the Appellate Court's Decision Is Appealable to the Supreme Court As a Matter of Right.

The Appellate Court decided that Plaintiff has a right to have the Commission process her charges even though Defendant had obtained a final unappealed-from judgment two-and-one-half years ago in Circuit Court that Plaintiff does not have such a right and even though the Commission had dismissed Plaintiff's charges for lack of jurisdiction. The Appellate Court's decision is an erroneous departure from well-established constitutional precedent and deprives Defendant of its constitutional vested rights.

It is unequivocally clear and fundamental that Defendant has a vested right in the July 2, 1980 judgment that the Commission does not have jurisdiction of Plaintiff's charges and in the Commission's dismissal of Plaintiff's charges. *E.g.*, *McCullough v. Virginia*, 172 U.S. 102 (1898); *Barnett v.*

Barnett, 336 Ill.App. 601, 84 N.E.2d 648 (3d Dist. 1949). Indeed, just six months ago the Seventh Circuit Court of Appeals in *Evans v. City of Chicago*, 689 F.2d 1286, 1296 (7th Cir. 1982), stated:

> Under Illinois law, a judgment becomes a vested right of property once it is no longer subject to review or modification. *Arnold & Murdock Co. v. Industrial Commission*, 314 Ill. 251, 255; 145 N.E. 342 (1924). *See Smolen v. Industrial Commissioner*, 324 Ill. 32, 34-35, 154 N.E. 441 (1926).

Under the Fourteenth Amendment, no state can deprive any person of life, liberty or property without due process of law. The United States Supreme Court stated in *The Board of Regents of State College v. Roth*, 408 U.S. 564, 577 (1972), that property interests are derived not from the Constitution but from independent sources, such as state law:

> Property interests. . .are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Under this due process analysis, because Defendant has a vested property right in the July 2, 1980 court judgment and the Commission's dismissal of Plaintiff's charges under Illinois law, the Fourteenth Amendment also protects Defendant from the deprivation of that right.

Plaintiff never appealed from the Circuit Court's July 2, 1980 ruling that the Commission does not have jurisdiction of Plaintiff's charges or from the Commission's dismissal of her charges. The Appellate Court's decision that this case should be remanded to the Commission for processing of Plaintiff's charges in spite of Plaintiff's failure in this regard operates to deprive Defendant of its constitutional rights.

Contrary to the Appellate Court's reasoning,[3] the United States Supreme Court's decision in *Logan v. Zimmerman Brush Company, supra,* is simply not applicable to this case. In *Logan,* the issue of whether Logan's constitutional rights would be violated if he was deprived of a Commission hearing because of the Commission's failure to hold a fact-finding conference within the statutorily mandated time period was on *direct appeal.* Here, Plaintiff *never appealed* the July 2, 1980 Circuit Court judgment that the Commission does not have jurisdiction of her charges or the dismissal of her charges before the Commission. Accordingly, Defendant, unlike Zimmerman Brush Company in *Logan,* obtained a vested right in the court judgment that the Commission does not have jurisdiction of Plaintiff's charges and in the Commission's dismissal of Plaintiff's charges.

Further, even if *Logan* were applicable here, it is fundamental that constitutional decisions, such as *Logan,* should be made prospective only where retroactive application would deprive Defendant of its vested constitutional rights. *E.g., Linkletter v. Walker,* 381 U.S. 618 (1965), *see also Skinner v. Reed-Prentice Division Package Machinery Co.,* 70 Ill.2d 1, 374 N.E.2d 437, *cert. denied sub nom. Hinckley Plastic, Inc. v. Reed-Prentice Division Package Machinery Co.,* 436 U.S. 946 (1978); *Kacher v. Pittsburgh National Bank,* 545 F.2d 842 (3d Cir. 1976).

Furthermore, in *Logan* the Court decided that Section 858(b) "is a procedural limitation on the claimant's ability to assert his rights," 455 U.S. at 433, and that Logan "is entitled to have the Commission consider the merits of his charge, based

---

[3] In its ruling, the Appellate Court cited as precedent its decision in *Lott v. Governors State University,* 106 Ill.App.3d 851, 436 N.E.2d 569 (1st Dist. 1982) (App. 4-6). *Lott* is inapposite. In *Lott,* unlike here, there was no prior Court decision that the Commission did not have jurisdiction of Lott's charge and, indeed, nowhere in the *Lott* opinion is there any indication that Lott's charge had been previously dismissed by the Commission.

upon the substantiality of the available evidence, before deciding whether to terminate his claim." 455 U.S. at 434. The Court also noted, however, that the State may establish statutes of limitations because they are "reasonable procedural requirements for triggering the right to an adjudication." 455 U.S. at 437.

Pursuant to this Court's decisions in *Springfield-Sangamon County Planning Commission v. FEPC*, 71 Ill.2d 61, 373 N.E.2d 1307 (1978), and *Board of Governors v. FEPC*, 78 Ill.2d 143, 399 N.E.2d 590 (1979), there is absolutely no doubt that that 180-day Complaint-filing provision is the equivalent of a statute of limitations. Because such a construction of the 180-day complaint-filing statute was made by a state court "whose province it is to construe state legislation," *Chase Securities Corp v. Donaldson*, 325 U.S. 304, 312 n. 8 (1945), it is manifestly clear that that is the construction which is properly applicable.

Therefore, unlike the 120-day fact-finding conference requirement held in *Logan* to be merely a "procedural limitation" imposed on the processing of the *claimant's* charge *once it is filed*, the 180-day Complaint-filing requirement is actually a statute of limitations in that it defines a time period within which the *Commission must file* a Complaint if it intends to do so, thereby placing an employer on notice that the *Commission* is making a claim against it.

For virtually the entire history of this State, this Court has held that the defense created by the running of a statute of limitations is a vested right. *Board of Education of Normal School District v. Blodgett*, 155 Ill. 441, 40 N.E. 1025 (1895). More recently, this Court restated and reaffirmed the holding in *Blodgett* that a statute of limitations defense is a vested right protected under the due process clause of the Illinois Constitution. *Wilson-Raymond Constructors Company v. Industrial Commission*, 79 Ill.2d 45, 53, 402 N.E.2d 584, 588 (1980).

Thus, in addition to its federal and state constitutional vested rights in a court judgment and Commission dismissal, Defendant also has a vested right under the Illinois Constitution in its defense that the limitations period in which the Commission could file a Complaint in this case has long since expired. Similarly, because Defendant has a vested property right in the bar created by the expiration of the statute of limitations period under Illinois law, under the due process analysis in *Board of Regents, supra,* the Fourteenth Amendment also protects Defendant from the deprivation of that right.

Because the Appellate Court's decision erroneously, and in irreconcilable conflict with well-defined legal precedent, operates to deny Defendant its constitutional vested rights, it is appealable as a matter of right to this Court.

B. Alternatively, Leave to Appeal Should Be Granted Because the Appellate Court Decision's Failure To Recognize the Doctrine of *Res Judicata* Is Contrary to, and Is a Radical Departure from, Well-Established Law[4]

On July 2, 1980, the Circuit Court in *Bell and Howell Schools v. State of Illinois FEPC, Earle Tockman and Joe Ann McClandon,* a case involving the same parties as are in this case, ruled that the Commission does *not* have jurisdiction of Plaintiff's charges. Plaintiff never appealed from that ruling.

Contrary to the July 2, 1980 determination of the Circuit Court, the Appellate Court, by deciding that the Department (successor to the Commission) should be directed to process Plaintiff's charges, in substance ruled that the Commission *does*

[4] If this Court rules that appeal is not appropriate as of right but grants Defendant leave to appeal, Defendant requests that it be given leave to appeal all the issues raised in this Petition, including those which Defendant posits it has a right to appeal. Because the Appellate Court's decision denies Defendant its constitutional vested rights and is in conflict with well-established judicial authority, see, *supra,* pp. 6-11, Defendant requests that it also be given leave to appeal those issues which Defendant is seeking to appeal as of right.

have jurisdiction of Plaintiff's charges. In so doing, the Appellate Court erroneously ignored the *res judicata* effect of the contrary July 2, 1980 ruling.

The Appellate Court's determination is contrary to, and is a radical departure from, well-established judicial authority which has unanimously recognized the doctrine of *res judicata* and its fundamental and necessary place in jurisprudence.

The cases in Illinois and elsewhere[5] are legion upholding the doctrine of *res judicata*. For example, in *People v. Bone*, 82 Ill.2d 282, 286, 412 N.E.2d 444, 446 (1980), *cert. denied*, 454 U.S. 839 (1981), this Court stated:

> *Res judicata* and collateral estoppel are judicial doctrines designed to protect litigants from the burden of retrying an identical cause of action or issue with the same party or privy, and to enhance judicial economy by prohibiting repetitive litigation. (*Parklane Hosiery Co. v. Shore* (1979), 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552, 559.)

Similarly, in *Hughey v. Industrial Commission*, 76 Ill.2d 577, 394 N.E.2d 1164 (1979), this Court held:

> Few rules are more essential or more firmly embedded in our jurisprudence than that of *res judicata*. It is a judicially created doctrine resulting from the practical necessity that there be an end to litigation and that controversies once decided on their merits shall remain in repose.

76 Ill.2d at 582, 394 N.E.2d at 1166. The doctrine reflects a public policy that necessarily mandates an end to litigation after each party has had an opportunity to present all relevant facts. *Anderson v. City of Kewanee*, 99 Ill.App.3d 456, 460-61, 425 N.E.2d 593, 596 (3d Dist. 1981).

---

[5] *See, e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1980).

The basic premise underlying the *res judicata* doctrine was recently reiterated in *Metropolitan Life Insurance Company v. Hansen*, 102 Ill.App.3d 354, 356, 430 N.E.2d 57, 58 (1st Dist. 1981):

> *Res judicata* provides that when a court of competent jurisdiction enters a final judgment on the merits of a cause of action, the parties to the suit and their privies are bound as to those issues which were raised, or could have been raised. [Citation omitted] The concept of privity contemplates a mutual or successive relationship to the same property rights which were the subject of prior litigation.

See also Gay v. Open Kitchens, Inc., 100 Ill.App.3d 968, 971-72, 427 N.E.2d 338, 341 (1st Dist. 1981).

Even if the previous judgment was *in error* it still operates as *res judicata* as to the matters actually determined and every other thing within the knowledge of the parties which might have been litigated. *In re Marriage of Donnellan*, 90 Ill.App.3d 1032, 1036, 414 N.E.2d 167, 170-71 (1st Dist. 1980). *See also LaSalle National Bank v. County Board of School Trustees of DuPage County*, 61 Ill.2d 524, 528-29, 337 N.E.2d 19, 21-22 (1975), *cert. denied*, 425 U.S. 936 (1976); *Morris v. Union Oil Co. of California*, 96 Ill.App.3d 148, 154, 421 N.E.2d 278, 282-83 (5th Dist. 1981); *Hilti, Inc. v. Griffith*, 68 Ill.App.3d 528, 532, 386 N.E.2d 63, 65 (1st Dist. 1978).

Indeed, as the Court in *In Re Marriage of Donnellan* pointed out:

> A branch of *res judicata*, referred to as estoppel by verdict or collateral estoppel, provides a similar conclusive effect when the same parties or their privies attempt to relitigate the identical issues actually or necessarily decided by a court of competent jurisdiction in an earlier, but different, cause of action.

90 Ill.App.3d at 1036, 414 N.E.2d at 171. *See also Raymond Construction Co., Inc. v. Midwest America Development, Inc.*, 67 Ill.App.3d 332, 334, 384 N.E.2d 907, 908 (1st Dist. 1978).

Manifestly, the July 2, 1980 ruling by the Circuit Court is *res judicata* as to the issue of whether the Commission has jurisdiction of Plaintiff's charges. Plaintiff, Defendant and the Commission were parties to the previous case, and because the Complaint in that case sought to enjoin Plaintiff and the Commission from proceeding on Plaintiff's charges because the Commission does not have jurisdiction over them (R. C61), the ruling that the Commission *does not have* jurisdiction of Plaintiff's charges was a ruling on the merits of that case. That decision was never appealed. Clearly, the Illinois Appellate Court's ruling that the Department (successor to the Commission) *has* jurisdiction over Plaintiff's charges erroneously ignored the *res judicata* effect of the July 2, 1980 ruling.

Therefore, because the Appellate Court's decision erroneously departs from unanimous contrary authority, Defendant seeks leave to appeal that decision to this Court.

VI. Conclusion

Because the Appellate Court's decision for the first time raises a question respecting Defendant's constitutional vested rights, Defendant seeks to take this appeal as a matter of right. Alternatively, for the reasons which form the bases for Defendant's seeking to take this appeal as a matter of right and because the Appellate Court's decision erroneously departs from well-established law in failing to recognize Defendant's constitutional rights and ignoring the *res judicata* effect of a contrary Circuit Court ruling involving the same parties as are in this case, Defendant respectfully urges that the decision of the Appellate Court be reviewed by this Court. In sum, Defendant requests that its Petition for Appeal as a Matter of Right or, Alternatively, Petition for Leave To Appeal be

granted, and that the decision of the Appellate Court insofar as it reversed the Circuit Court's ruling dismissing Counts I and II of Plaintiff's Complaint be reversed.

BELL AND HOWELL SCHOOLS

By /s/ VEDDER, PRICE, KAUFMAN & KAMMHOLZ
/s/ MARIAN C. HANEY
Its Attorneys

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
Marian C. Haney
Barbara J. Stob
115 South LaSalle Street
Chicago, IL 60603
(312) 781-2200

APPENDIX G

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

May 31, 1983

Ms. Marian C. Haney
Vedder, Price, Kaufman & Kammholz
115 S. LaSalle St.
Chicago, IL 60603

No. 58158— Joe Ann McClandon, respondent, vs. Bell and Howell Schools, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause. Simon, J., took no part. This will further serve as notice that the mandate of this Court will issue to the Clerk of the Appellate Court on June 21, 1983.

Very truly yours,
/s/ JULEANN HORNYAK
Clerk of the Supreme Court

APPENDIX H

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

May 31, 1983

Ms. Marian C. Haney
Vedder, Price, Kaufman
& Kammholz
115 S. LaSalle St.
Chicago, IL 60603

No. 58190— Joe Ann McClandon, petitioner, vs. Bell and Howell Schools, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause. Simon, J., took no part. This will further serve as notice that the mandate of this Court will issue to the Clerk of the Appellate Court on June 21, 1983.

Very truly yours,

/s/ JULEANN HORNYAK
Clerk of the Supreme Court

APPENDIX I

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

BELL AND HOWELL SCHOOLS *Plaintiff,* *v.* ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION, ET AL. *Defendants.*	NO. 79 CH 1085

ORDER

This matter coming to be heard on Motion of Defendant Fair Employment Practices Commission to Dispose of this Action, all parties having received notice and the Court being duly advised in the premises

This Court hereby FINDS that the Fair Employment Practices Commission has no jurisdiction to proceed on charges 76 C 189 and 76 C 211.

It is therefore ORDERED that this action be dismissed with prejudice and without costs.

ENTER:

JUDGE ARTHUR L. DUNNE
JUL 2, 1980
CIRCUIT COURT

WILLIAM J. SCOTT
Attorney for FEPC
160 N. LaSalle
Chicago, Illinois
Moshe Jacobius
Asst. Atty. Gen. 793-3587

APPENDIX J

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF: JOE ANN McCLANDON *COMPLAINANT,* AND BELL AND HOWELL SCHOOLS *RESPONDENT,*	CHARGE NOS. 1976CN-0189 1976CN-0211

ORDER

This matter comes before the Commission upon the Recommended Order and Decision of Judge Patricia Patton. Judge Patton recommends dismissal of the complaint on the basis of lack of jurisdiction by the Human Rights Commission to proceed on the charges underlying the complaint.

ACCORDINGLY, it is hereby ORDERED that the complaint of JOE ANN McCLANDON against BELL AND HOWELL SCHOOLS, Charge Nos. 1976CN-0189 and 1976CN-0211 be, and the same are, DISMISSED.

ENTERED: September 10, 1980

HUMAN RIGHTS COMMISSION

/s/ MARION N. BARUCH
Marion N. Baruch

/s/ ARNOLD JONES, JR.
Arnold Jones, Jr.

/s/ REBECCA SIVE-TOMASHEFSKY
Rebecca Sive-Tomashefsky

APPENDIX K

No. 81-2100

IN THE

Appellate Court of Illinois

FIRST JUDICIAL DISTRICT

JOE ANN McCLANDON, *Plaintiff-Appellant,* v. BELL AND HOWELL SCHOOLS, *Defendant-Appellee.*	Appeal from the Circuit Court of Cook County, County Department, Chancery Division No. 80 CH 8404 The Honorable **Richard L. Curry,** Judge Presiding.

BRIEF OF DEFENDANT-APPELLEE

(EXCERPT)

MARIAN C. HANEY
Attorney for Defendant-Appellee

Of Counsel:
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2200

Oral Argument Requested

Pandick Press Midwest, Inc., Chicago, Illinois • 454-7600

B. The United States Supreme Court's Decision in *Logan v. Zimmerman Brush Company* Has No Effect on the Illinois Supreme Court's Ruling That Section 858.01a Is Unconstitutional.

On February 24, 1982, the United States Supreme Court in *Logan v. Zimmerman Brush Company*, 71 L.Ed.2d 265, held that Section 858(b) of the Illinois Fair Employment Practices Act, Ill.Rev.Stat. ch. 48, §851, *et seq.*, was unconstitutional under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Section 858(b) gave the Fair Employment Practices Commission 120 days after the filing of a charge to convene a fact-finding conference to obtain evidence, ascertain the parties' positions, and explore the possibility of a settlement.

The United States Supreme Court decided that Section 858(b) "is a procedural limitation on the claimant's ability to assert his rights," 71 L.Ed.2d at 276, and that Logan "is entitled to have the Commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim." 71 L.Ed.2d at 277. The Court also noted, however, that the State may establish statutes of limitations because they are "reasonable procedural requirements for triggering the right to an adjudication." 71 L.Ed.2d at 279.

Plaintiff's contention that *Logan* requires a reversal of *Wilson* under the Supremacy Clause of the United States Constitution (Plaintiff Mem. 13) is simply without merit. It is a *non-sequitur* to assert that the United States Supreme Court's *Logan* decision that the 120-day requirement for holding a fact-finding conference is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution requires a reversal of the Illinois Supreme Court's *Wilson* decision that a statute which allows a claimant to file a

previously barred claim in Circuit Court is unconstitutional under the due process and equal protection clauses of the Illinois Constitution and is special legislation.

Plaintiff's attempted application of the Supremacy Clause of the Federal Constitution to the issues here (Plaintiff Mem. 4, 13) is inappropriate. Under the Supremacy Clause, "the Judges in every state shall be bound" by Federal laws. It is clear, however, that a state court may apply more stringent standards as a matter of state law when construing state constitutional counterparts of provisions of the Federal Constitution. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n. 6 (1981). Therefore, even assuming *arguendo*, contrary to the fact, that *Logan* could be interpreted as rendering Section 858.01a constitutional under the Federal Constitution, that would not preclude, and would have no effect on, the Illinois Supreme Court's determination in *Wilson* that the Illinois Constitution bars Section 858.01a.

It appears that what Plaintiff, in fact, is arguing is that the 180-day Complaint filing requirement, Ill.Rev.Stat. ch. 48, §858.01(a), is unconstitutional under *Logan*. Even assuming *arguendo* that the 180-day Complaint filing requirement is not distinguishable from the 120-day fact-finding provision and, in an appropriate case, would be held unconstitutional by the United States Supreme Court, Plaintiff simply cannot now raise the constitutionality of the 180-day provision before this Court. The Circuit Court ruled in *Bell and Howell Schools v. State of Illinois FEPC, Earle Tockman and Joe Ann McClandon*, No. 79 CH 1085, on July 2, 1980, that, because the 180-day period had expired, the Commission did not have jurisdiction to proceed on Plaintiff's charges. Thus, because Plaintiff did not appeal that Circuit Court ruling within 30 days, as she was required to do under Supreme Court Rule 303(a), Plaintiff cannot now timely raise the issue of whether the 180-day Complaint filing requirement is constitutional. Instead, Plaintiff is limited by her previous option to proceed under Section 858.01a.

Even if Plaintiff could raise the constitutionality of the 180-day requirement, and even if the requirement was ruled unconstitutional, that ruling, while it would eliminate the purported rationale for enacting Section 858.01a, would have no impact on the *Wilson* decision that Section 858.01a is unconstitutional.

The recent decision of the Second Division of this Court in *Lott v. Governors State University*, 28 FEP Cases 1313 (1982), is inapplicable here. Lott's cause of action was based on Section 858.01a. The Court in *Lott* acknowledged the unconstitutionality of Section 858.01a, but stated that under *Logan* the plaintiff was entitled to have the Commission consider the merits of his charge. The Court then held that, upon remand, the Department of Human Rights and the Human Rights Commission should be added as necessary parties defendants and the trial court should then order the Department to process the plaintiff's charge.

The *Lott* decision does not withstand scrutiny. The Court in that case never even considered the defendant's due process rights vis-a-vis the Commission's prior dismissal of Lott's complaint. Further, the Court did not analyze the effect of its decision on the defendant who would now be faced with increased potential backpay liability as a result of the reopening of a complaint previously dismissed by the Commission. Undisputedly, the dismissal of a complaint because of administrative failure is not the fault of the complainant; equally undeniable, however, is that the defendant was not responsible for the administrative delay. The *Lott* Court, nonetheless, opted to penalize the defendant.

Although it is unfortunate that anyone should suffer from administrative failure in this case, certainly it should not be Defendant. The 180-day Complaint filing statute was in effect at the time Plaintiff filed her charges. Clearly, Defendant had the right to expect that an existent statute would be enforced.

Conversely, Plaintiff, charged with knowledge of the 180-day Complaint filing requirement, could have asked the Commission to take some action within the 180-day period. In other words, although the Commission is responsible for the administrative failure in this case, the only person who should arguably participate in that responsibility is Plaintiff. Manifestly, the only entity clearly not at fault is Defendant. It is, therefore, totally inequitable, years after the fact, to require Defendant to shoulder the blame for the Commission's inaction. Indeed, the only cause of action which should be viable is a suit by Plaintiff against the Commission for its negligence. An employer should not be burdened for its reliance on an existent applicable statute.

Most importantly, the *Lott* case simply does not apply to the case before this Court. Here, the Circuit Court ruled on July 2, 1980, that, pursuant to the 180-day Complaint filing statute, the Commission did not have jurisdiction to proceed on Plaintiff's charges and ordered the case dismissed with prejudice. That July 2, 1980 judgment—even if erroneous—is *res judicata* in this case. *E.g., Hughey v. Industrial Commission*, 76 Ill.2d 577, 394 N.E.2d 1164 (1979). Plaintiff never appealed that decision and did not raise the constitutionality of the 180-day Complaint filing provision; thus, she cannot do so now. Accordingly, *in this case*, the Commission does not have jurisdiction to proceed on Plaintiff's charges and, unlike in *Lott*, this Court is precluded from allowing the Commission to proceed on these charges.

Moreover, there is absolutely no doubt that Defendant acquired a vested right in the previous Circuit Court judgment. *E.g., Barnett v. Barnett*, 336 Ill.App. 601, 84 N.E.2d 648 (3d Dist. 1949). To deprive Defendant of that vested right would violate Defendant's due process rights and work an injustice and hardship upon Defendant.

In analogous situations, Courts simply refuse to apply retroactively a decision holding unconstitutional a statute previously relied upon. For example, in *Kacher v. Pittsburgh National Bank*, 545 F.2d 842 (3d Cir. 1976), the Court was presented with the question of whether a creditor which proceeded to enforce its security interest under state replevin procedures later declared unconstitutional is answerable to a debtor whose property was seized and sold. In responding in the negative, the Court stated:

> There is ample precedent for a refusal to apply *Fuentes* [*v. Shevin*, 407 U.S. 67 (1972)] retrospectively to invalidate replevin proceedings begun before the date of the decision. *See, e.g., Douglas-Guardian Warehouse Corporation v. Posey*, 486 F.2d 739, 742 (10th Cir. 1973); *Ruotolo v. Gould*, 489 F.2d 1324 (1st Cir. 1974); *McIntyre v. Associates Financial Service Co.*, 328 N.E.2d 492, 495 (Mass. 1975). Giving *Fuentes* a retroactive effect is not only harsh and impractical, but as Justice Clark, sitting by designation, in *Douglas-Guardian Warehouse Corporation v. Posey, supra*, 486 F.2d at 742, incisively stated, "a retroactive application of *Fuentes v. Shevin, supra*, would work an injustice and a hardship upon [parties] who have lawfully acquired vested rights in the form of their state judgments . . ."
>
> As a consequence, a number of courts have not only refused to apply *Fuentes* retroactively but have let stand attachments and other results of unconstitutional state procedures obtained after *Fuentes* had cast doubt on those procedures but before a judicial decision invalidating the particular state statutory scheme in question. *See, e.g., Ruotolo v. Gould, supra; Cranston v. Commercial Chemical Corp.*, 324 A.2d 301, 303 (Me. 1974). Parties are thereby permitted to rely on state statutory procedures even after a United States Supreme Court decision has rendered them highly suspect.

545 F.2d at 846 (footnote omitted).

Clearly, constitutional decisions may be made prospective only. *Linkletter v. Walker*, 381 U.S. 618 (1965); *see also Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1978), *cert. denied sub nom. Hinckley Plastic, Inc. v. Reed-Prentice Division Package Machinery Co.*, 436 U.S. 946 (1978). Such is particularly appropriate where retroactive application would cause hardship to those who have relied upon the prior law. Here, the 180-day Complaint filing statute still has not explicitly been declared unconstitutional and, indeed, because that statute, being a statute of limitations, is distinguishable from the 120-day factfinding conference period held unconstitutional in *Logan*, even after *Logan* the 180-day statute may very well still be constitutional. Assuming *arguendo* it is unconstitutional, however, retroactive application of such finding of unconstitutionality would deprive Defendant of its vested right in the July 2, 1980 judgment and would cause an extreme hardship on Defendant by subjecting Defendant to potential increased liability previously unforeseen; accordingly, retroactive application is improper here.

In sum, *Lott* does not apply here because on July 2, 1980, the Circuit Court found that the Commission did not have jurisdiction of Plaintiff's charges, Plaintiff never appealed that judgment, and, thus, that ruling is *res judicata* here. Further, assuming that *Lott* correctly ruled that in effect the 180-day Complaint filing statute is unconstitutional, retroactive application of that holding would deprive Defendant of its vested right in the July 2, 1980 judgment and would cause a severe hardship upon Defendant who played absolutely no part in the administrative delay and who would now be faced with potential increased liability previously unforeseeable. Clearly, the *Lott* case has no impact on the case before this Court.

APPENDIX L

IN THE

APPELLATE COURT OF ILLINOIS

FOR THE FIRST JUDICIAL DISTRICT

JOE ANN McCLANDON, Plaintiff-Appellant, v. BELL AND HOWELL SCHOOLS, Defendant-Appellee.	Appeal from the Circuit Court of Cook County, County Department, Chancery Division No. 81-2100 Honorable Richard L. Curry, Judge Presiding

BRIEF FOR PLAINTIFF-APPELLANT (EXCERPT)

ROSLYN C. LIEB
Attorney for Plaintiff-Appellant
Northwestern University
Legal Clinic
339 East Chicago Avenue
Room 119
Chicago, Illinois 60611
(312) 649-8576

Oral Argument Requested
Proof of Service Within

Logan requires that each complainant, whose timely filed charge was dismissed because of the failure of the Commission to convene a fact finding conference within 120 days of the proper filing of the charge, be accorded a hearing. The same requirement applies to each complainant whose timely filed charge was dismissed because of the failure of the Commission to issue a complaint within the statutorily prescribed time period. These claimants too must be accorded a hearing. To hold otherwise would be to deny these persons the due process of law guaranteed under the Fourteenth Amendment of the United States Constitution.

Further, to foreclose such claimants from adjudication of their claims would create two classes of claimants: those whose claims were adjudicated and those whose claims were not. Such a classification would result in a denial of equal protection of the laws. To paraphrase Justice Powell's concurrence:

> Under this classification, claimants with identical claims, despite equal diligence in presenting them, would be treated differently, depending on whether the Commission itself neglected to [issue a complaint] within the prescribed time. The question is whether this unusual classification is rationally related to a state interest that would justify it.
>
> The State no doubt has an interest in the timely disposition of claims. But the challenged classification fail[s] to promote that end—or indeed any other—in a rational way. As [claimants] possess no power to [issue

IN THE
APPELLATE COURT OF ILLINOIS
FOR THE FIRST JUDICIAL DISTRICT

JOE ANN McCLANDON,
Plaintiff-Appellant,
v.
BELL AND HOWELL SCHOOLS,
Defendant-Appellee.

Appeal from the Circuit Court of Cook County, County Department, Chancery Division

No. 81-2100

Honorable
Richard L. Curry,
Judge Presiding

NOTICE

TO: Marian C. Haney
Vedder, Price, Kaufman & Kammholz
115 South LaSalle Street
Chicago, Illinois 60603

PLEASE TAKE NOTICE that on March 26, 1982, we shall file in the Office of the Clerk of the Appellate Court of Illinois, First District, Daley Center, Chicago, Illinois, Plaintiff-Appellant's Brief, a copy of which is attached and herewith served upon you.

Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I, Roslyn C. Lieb, an attorney, certify that I served a copy of the above Notice and Plaintiff-Appellant's Brief, attached hereto, upon Marian C. Haney at the above noted address by

placing copies of same in the U.S. mailbox at 339 East Chicago Avenue, Chicago, Illinois, first class postage prepaid, on March 26, 1982.

_____

Attorney for Plaintiff-Appellant

Roslyn C. Lieb
Northwestern University Legal Clinic
339 East Chicago Avenue, Room 119
Chicago, Illinois 60611
(312) 649-8576

Office-Supreme Court, U.S.
FILED
SEP 30 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-315

In the
Supreme Court of the United States
OCTOBER TERM, 1983

DeVRY, Inc.,
Petitioner,

v.

JOE ANN McCLANDON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

ROSLYN C. LIEB,
Counsel for Respondent

Of Counsel:
Northwestern University Legal Clinic
339 East Chicago Avenue — Room 119
Chicago, Illinois 60611
Telephone: (312) 649-8576

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

Subject Index

	Page
Statement of the Case	2
Reasons for Denying the Writ	3
Conclusion	8

TABLE OF AUTHORITIES

Cases

Baldwin v. *Iowa Traveling Men's Assn.*, 283 U.S. 522 (1931) 5

Board of Governors v. *Illinois FEPC*, 78 Ill.2d 143, 399 N.E.2d 590 (1979) 2

Federated Department Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981) 5

Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) 6, 7

Metropolitan Life Insurance Co. v. *Hansen*, 102 Ill. App.3d 354, 430 N.E.2d 57 (1st Dist. 1981) 5

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 6

People v. *Kidd*, 398 Ill. 405, 75 N.E.2d 851 (1947) 4

United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 6

Wilson v. *All-Steel, Inc.*, 87 Ill.2d 28, 428 N.E. 2d 489 (1981) 6

Constitutional Provisions and Statutes

U.S. Const. amend. XIV, §1 ..... 3, 6

Ill. Rev. Stat. ch. 48, §858.01(a) 2, 3, 4

Ill. Rev. Stat. ch. 48, §858.01a 2, 3, 5, 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-315

DeVRY, Inc.,

Petitioner,

v.

JOE ANN McCLANDON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

Pursuant to United States Court Rule 22, Respondent Joe Ann McClandon files this brief in opposition to Petitioner's[1] petition for a writ of certiorari, and requests that the Court deny the petition. Respondent submits that the Appellate Court of Illinois, First Judicial District decided correctly the issues presented to it, and thus the January 10, 1983, and February 28, 1983 judgments do not warrant review by the Court. More particularly, the Appellate Court disposed of the issues that Petitioner raises in its petition according to established precedent and sound reasoning.

---

[1] Petitioner Bell and Howell Schools is now DeVry, Inc. (Petition's Br. at 1 n.1)

STATEMENT OF THE CASE

Petitioner's Statement of the Case omits and mischaracterizes certain aspects of this case which Respondent will attempt to clarify. Although the Illinois Fair Employment Practices Commission (Commission) failed to issue a complaint within 180 days of the timely filing of Respondent's discrimination charges, as dictated by Ill. Rev. Stat. ch 48, § 858.01(a), the Commission did issue a complaint upon a finding of substantial evidence. (App. A, p. 2a) The matter was then set for hearing before an administrative law judge. Over one year later, Petitioner instituted an action for declaratory and injunctive relief in the Circuit Court of Cook County. In response to the Commission's Motion to Dispose of that Action,[2] on July 2, 1980, the Circuit Court found that the Commission had no jurisdiction to proceed on Respondent's charges, but then dismissed Petitioner's action with prejudice and without costs. (App. I, p. 34a) After the Commission dismissed her complaint, Respondent filed a four-count complaint in state court, two counts of which were based on Ill. Rev. Stat. ch. 48, § 858.01a. This statutory provision was enacted to permit persons like Respondent the opportunity to proceed on their charges, but was held to be unconstitutional by the Illinois Supreme Court while Respondent's appeal was pending before the Appellate Court. (App. A, p. 3a).

Other than these noted points, the Statement of the Case adequately sets forth the history of this case.

---

[2] The Commission filed the motion after the Illinois Supreme Court had ruled in a different case that the Commission had no jurisdiction over charges unless it acted upon those charges within 180 days. *Board of Governors v. Illinois FEPC*, 78 Ill.2d 143, 399 N.E.2d 590 (1979).

REASONS FOR DENYING THE WRIT

THE ILLINOIS APPELLATE COURT'S DECISIONS ARE CONSISTENT WITH THIS COURT'S DECISIONS.

Contrary to Petitioner's contention in its petition, the Appellate Court correctly decided the issues before it. Petitioner argues in its petition that the Appellate Court's judgment should be reversed because the court failed to apply the principle of *res judicata* to the July 2, 1980 Order of the Circuit Court, thereby depriving it of its Fourteenth Amendment rights to due process.[3] Yet, as Petitioner concedes in its petition, although the court found that the Commission lacked jurisdiction, the court dismissed Petitioner's complaint (Petition at 3, App. I, p. 34a). Thus, Respondent was in the position of the prevailing party. At the time the Order was entered, the appeal rights, if any, lay with the Petitioner and not with Respondent.

Additionally, the Appellate Court determined correctly that the doctrine of *res judicata* had no bearing on the issues before it because the initial proceedings were brought pursuant to Ill. Rev. Stat. ch. 48, § 858.01(a) and the subsequent proceedings brought pursuant to Ill. Rev. Stat. ch. 48, § 858.01a. (App. A, B, pp. 1a-10a). The latter section provided that if an individual commenced an

[3] Petitioner's contention that it has a vested right in the July 2nd Order is unwarranted. That order was a dismissal with prejudice of Petitioner's action. If anything, it is Respondent who would have a vested right in the order.

action pursuant to § 858.01(a) and the Commission failed to act within the 180 days, then that individual could institute proceedings in the Circuit Court to obtain relief. The statute provided two separate avenues for seeking relief, the second dependent upon the failure of the first. The doctrine of *res judicata* fails to apply to this situation. 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.415, at 2055 (2d ed. 1982) ("[s]ometimes a statutory change. . . creates a new cause of action or a new procedure for enforcing a right, . . . and to that extent diminishes the scope of the conclusive effect of a prior judgment or decree").

As the Appellate Court appropriately noted in its February 28, 1983 supplemental opinion:

> McClandon's arguments are directed at section 8.01a. Defendant's declaratory action was related to the jurisdiction of the FEPC to proceed on an administrative complaint filed after the 180-day period required by section 8.01(a). Ill. Rev. Stat. 1979, ch. 48, par. 858.01(a).
>
> Therefore, the effect of the declaratory action, if any (the action was dismissed rather than granted), was to defeat plaintiff's claim before the FEPC.
>
> • • • •
>
> The petition for rehearing is denied.

(App. B, p. 10a) The Court's opinion was based on well-established principles of state and federal law. The doctrine of *res judicata* attaches "[w]hen a former adjudication is relied upon as an absolute bar to a *subsequent* action. . . ." *People* v. *Kidd,* 398 Ill. 405, 408-09, 75 N.E. 2d 851, 854 (1947) (emphasis added). In other words, as this Court has stated, *res judicata* attaches in order " 'that there be an end of litigation; that those who have con-

tested an issue shall be bound by the result of the contest, and that *matters once tried shall be considered forever settled* as between the parties.'" *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981), citing *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525 (1931) (emphasis added). In this case, Respondent was not relitigating the same issues in a subsequent action. Rather, she was litigating different issues (her contentions of employment discrimination), through a different procedure.

The Appellate Court's correct application of the law also conforms to the policy underlying the doctrine of *res judicata* and to sound principles of fairness. In fact, Petitioner noted this policy in its petition for leave to appeal to the Supreme Court of Illinois:

> *Res judicata* provides that when a court of competent jurisdiction enters a final judgment on the merits of a cause of action, the parties to the suit and their privies are *bound as to those issues which were raised, or could have been raised.* [Citation omitted] The concept of privity contemplates a mutual or successive relationship to the *same property rights which were the subject of prior litigation.*

Metropolitan Life Insurance Co. v. *Hansen*, 102 Ill. App. 3d 354, 356, 430 N.E.2d 57, 58 (1st Dist. 1981) (emphasis added) (quoted at App. F, p. 29a). As previously stated, the statute provided separate avenues for Respondent to pursue relief. If *res judicata* were to operate so as to prevent Respondent from seeking relief in the Circuit Court, then she would be deprived of a property right in the § 858.01a cause of action without due process of law. At the time the July 2nd Order was entered, § 858.01a had been added to Fair Employment Practices Act, giving

Respondent a right to proceed in state court. In fact, Respondent possessed a property right in that avenue of redress, a property right which is protected by the Due Process Clause of the Fourteenth Amendment. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Simply stated, the court's July 2nd Order did not, and could not, deprive Respondent of her property rights in § 858.01a.

Petitioner's argument to the contrary fails both legally and logically. As stated in *Metropolitan Life Insurance*, *res judicata* attaches only to those issues raised or those which could have been raised. At the time the July 2nd Order was entered, Respondent possessed the ability to commence an action in the Circuit Court for the desired relief. If the Order operated as *res judicata* of her action in the Circuit Court, then § 858.01a would have been meaningless. Petitioner would put Respondent in the peculiar and precarious position of anticipating litigation of the constitutionality of § 858.01a. Certainly, Respondent's arguments would have been dismissed. *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947) (issue must be ripe for adjudication). In short, at the time the July 2nd order was entered, Respondent believed she possessed the right to proceed pursuant to § 858.01a and acted accordingly.

Finally, the issue raised by Petitioner is an issue very unlikely to recur. Since this cause was filed, Illinois law has changed. The Illinois Supreme Court has declared § 9-102(B), the successor statute to § 858.01a, to be unconstitutional. *Wilson* v. *All-Steel, Inc.*, 87 Ill.2d 28, 428 N.E.2d 489 (1981). Complainants, therefore, no longer

have the option of filing an action in state court. Additionally, once a person files a charge with the Illinois agency, that person has a property interest in the cause of action and is entitled to " 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' 'for [a] hearing appropriate to the nature of the case.' " *Logan* v. *Zimmerman Brush Co.*, 455 U.S. at 437 (emphasis in original; citations omitted).

In conclusion, the January 10, 1983, and February 28, 1983 judgments of the Appellate Court do not warrant review by this Court. The Appellate Court decided correctly the issue of *res judicata*. Based on established legal precedent, sound policy, and principles of fairness, the court held the doctrine of *res judicata* does not prevent Respondent from adjudicating the merits of her employment discrimination charge.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOE ANN MCCLANDON,
Respondent,

By: .....
ROSLYN C. LIEB,
Counsel for Respondent

Of Counsel:
Northwestern University Legal Clinic*
339 East Chicago Avenue — Room 119
Chicago, Illinois 60611
Telephone: (312) 649-8576

* MARIAN W. PAYSON, a third year law student, assisted in the preparation of this brief.

No. 83-315

Office Supreme Court, U.S.
FILED
OCT 6 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DeVRY INC.,

Petitioner,

v.

JOE ANN McCLANDON,

Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

MARIAN CONROY HANEY
115 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

Of Counsel:

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2200

Pandick Press Midwest, Inc. Chicago • 454-7600

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REASONS FOR GRANTING THE WRIT	1
CONCLUSION	4

TABLE OF AUTHORITIES

Cases

	PAGE
Federated Department Stores, Inc. v. *Moitie*, 452 U. S. 394 (1981)	3
Wilson v. *All-Steel, Inc.*, 87 Ill.2d 28, 428 N.E.2d 489 (1981)	2

Constitutional Provision and Statutes

U. S. Const. amend. XIV, §1	1
Ill. Rev. Stat. ch. 48, §858.01(a)	1, 2
Ill. Rev. Stat. ch. 48, §858.01a	2, 3

No. 83-315

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DeVRY INC.,

Petitioner,

v.

JOE ANN McCLANDON,

Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

REASONS FOR GRANTING THE WRIT

The issue presented for review to this Court is whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees to a claimant a right to a hearing where an opposing party would thereby be deprived of its vested due process rights in a prior judgment and where the doctrine of *res judicata* would thereby be ignored.

After the Circuit Court's July 2, 1980 ruling that the Commission does not have jurisdiction over McClandon's charges because the requirements of Ill. Rev. Stat. ch. 48,

§858.01(a) were not met, McClandon had the following options: (1) she could appeal that decision; and/or (2) she could appeal the Commission's subsequent dismissal of her charges on September 10, 1980; and/or (3) she could file a lawsuit in Circuit Court under Ill. Rev. Stat. ch. 48, §858.01a, which allowed a person such as McClandon who filed a charge with the Commission prior to March 30, 1978, which charge was not settled, adjusted or, within 180 days of its filing, the subject of a Commission Complaint or an order that no Complaint be issued, to seek relief in Circuit Court. Instead of appealing both/either the Circuit Court's July 2, 1980 ruling and/or the Commission's September 10, 1980 dismissal of her charges and preserving her argument that the Commission has jurisdiction over her charges, McClandon waived that argument and opted only to file a lawsuit under Ill. Rev. Stat. ch. 48, §858.01a—which statute was later ruled unconstitutional. *Wilson* v. *All-Steel, Inc.*, 87 Ill.2d 28, 428 N.E.2d 489 (1981).

McClandon's opposition brief does not address the issue sought to be reviewed here and its importance but rather makes only one serious—albeit irrelevant—argument:[1] that *res judi-*

[1] McClandon makes two other arguments which are simply without merit (Opp. Br. 3 and N. 3).

First, McClandon claims that because she was technically the prevailing party in the July 2, 1980 state court decision, she could not appeal. This, of course, is a disingenuous argument of form over substance. There is no doubt that when the Circuit Court decided that the Commission did not have jurisdiction of McClandon's charges, McClandon was the losing party. Assuming *arguendo* that a technically prevailing party cannot appeal, if McClandon had wanted to appeal, she merely could have asked the Circuit Court to restate its decision, *e.g.*, grant judgment to DeVRY INC. At any rate, McClandon was definitely the losing party in the subsequent September 10, 1980 dismissal of her charges by the Commission. She did not appeal that ruling either.

Second, McClandon argues that she—not DeVRY INC.—has a vested right in the July 2, 1980 order. Obviously, to the extent each party prevailed in substance, that party has a vested right in the ruling.

cata did not bar McClandon's state court lawsuit under Ill. Rev. Stat. ch. 48, §858.01a (Opp. Br. 4-6). Obviously, the principle of *res judicata* does not bar Plaintiff's filing a lawsuit under Ill. Rev. Stat. ch. 48, §858.01a, but it does bar relitigation of the already decided issue that the Commission does not have jurisdiction of Plaintiff's charges—which is precisely the issue McClandon relitigated in, and which was decided with a different result by, the Illinois Appellate Court in this case.

Finally, McClandon's assertion that this issue is "very unlikely to recur" because the successor statute to Ill. Rev. Stat. ch. 48, §858.01a, has been held unconstitutional (Opp. Br. 6-7) is devoid of merit. Whether or not the precise factual situation before this Court will repeat itself is not relevant. What is critically important, however, is the fact that pursuant to the lower Court's ruling which allows relitigation of an unappealed-from issue already finally decided, at the present time the doctrine of *res judicata* is dead in Illinois, a party does not obtain a vested right in a prior ruling and henceforth in Illinois issues can be repeatedly relitigated at whim. In essence, unless this Court grants certiorari and reverses the Illinois Appellate Court's decision, the public policy—espoused by this Court—that there be an end to litigation, *e.g.*, *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394, 401 (1981), is not only disserved but is blatantly thwarted.

CONCLUSION

For these reasons and those set forth in DeVRY INC.'s previously filed Petition for a Writ of Certiorari, it is respectfully submitted that DeVRY INC.'s Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MARIAN CONROY HANEY
115 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

Of Counsel:

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2200

October, 1983